No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLEES.

THOMPSON, CATHCART & LEWIS,
BARRY S. ULRICH,
Honolulu, T. H.,
Solicitors for Appellees.

PILLSBURY, MADISON & SUTRO,
L. G. MCARTHUR,
San Francisco, California,
Of Counsel.

INDEX.

No. 3374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HAWAIIAN PINEAPPLE COMPANY, LIMITED (a corporation),

Appellant,

vs.

MASAMARI SAITO and LIBBY, MCNEILL & LIBBY OF HONOLULU, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

In the original bill of complaint filed in equity, in this case, the prayer was for the issuance of an injunction enjoining Masamari Saito from selling and delivering, and Libby, McNeill & Libby of Honolulu, Limited, a corporation, from buying and receiving pineapples grown on certain lands held under lease by Saito, which pineapples Libby, McNeill & Libby had contracted to purchase under a contract dated April 1, 1918. The basis of the prayer was the contention that the pineapples in question were covered by a previ-

ous contract between Saito and the complainant, the Hawaiian Pineapple Company, Limited, dated May 18, 1916, and that Saito was under obligation, by virtue of that contract, to sell and deliver them to the Hawaiian Pineapple Company. The pineapples in question were grown on lands which had been acquired by Saito after the execution of the contract of May 18, 1916, with the Hawaiian Pineapple Company, and the question presented to the court was whether or not that contract covered pineapples to be grown on lands which were not held or controlled by the planter at the time of its execution. The trial judge in equity first issued a temporary injunction upon the filing of a satisfactory bond and, subsequently, after hearing, granted the prayer of the complainant and made the injunction permanent. Upon an appeal taken to the Supreme Court of the Territory of Hawaii, that court decided that under the terms of the contract of May 18, 1916, Masamari Saito was not obligated to sell and deliver to the Hawaiian Pineapple Company, Limited, pineapples grown by him on lands acquired after the date of that contract. Pursuant to this decision, the decree of the trial judge appealed from was vacated and set aside, the injunction was dissolved, and the cause was remanded to the court below for further proceedings consistent with the opinion. From this decree of the Supreme Court of Hawaii, this appeal has been taken.

The facts pertinent to the questions now presented to this court, may briefly be summarized as follows:

Under date of May 18, 1916, the Hawaiian Pineapple Company, Limited, appellant herein, entered into the contract referred to with the appellee, Masamari Saito, an independent pineapple grower, with pineapple holdings at Leilehua on the Island of Oahu, comprising approximately one hundred and fifty (150) acres of arable land. The contract in question contained the following mutual covenants and undertakings:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."
>
> "The Planter agrees that he will deliver to the Pineapple Company, under the terms and conditions and with the exceptions hereinafter contained, all the merchantable Smooth Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu, during the term stated."
>
> * * * * * * *
>
> "It is mutually agreed that the Pineapple Company will furnish f. o. b. Railroad Cars at Leilehua, Oahu, lug boxes for the delivery of the fruit, and that the Planter will deliver said fruit f. o. b. Railroad Cars at Leilehua, Oahu, in said lug boxes, and that the said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the said Pineapple Company."

The contract in question was on a regular printed form of contract prepared by the Hawaiian Pineapple Company, Limited, for use in contracting with planters,

with blanks left for the filling in of the name of the place where the lands to be covered by the contract were located, for the date, for the name of the planter, his place of residence, and for the place at which the delivery of the fruit was to be made (Trans. p. 236).

The printed form of contract was taken to Saito at his home at Leilehua and his signature was procured before these blanks had been filled in. The blanks were subsequently filled in by a clerk of the Hawaiian Pineapple Company, Limited, prior to the execution of the contract by the company and at or about the same time the following endorsement was made by the clerk of the Hawaiian Pineapple Company upon the contract near the bottom of the last page:

"Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)" (Trans. p. 236).

As has been indicated, at the time of the execution of the contract, all of Saito's holdings were at Leilehua, Oahu, and comprised approximately one hundred and fifty (150) acres. A copy of the contract as thus finally completed and executed was delivered to Saito.

Upon these facts the question is presented: Does this contract cover pineapples grown during the period stated upon the one hundred and fifty (150) acres held by Saito at Leilehua at the time of the execution of the contract, or does it apply to all pineapples which Saito might grow, or own, or control, anywhere on the whole Island of Oahu during the four (4) year period?

This very question was argued at length before this court on the hearing of appellant's petition for an injunction pending the appeal. In its opinion denying the application for the injunction, this court held that the Supreme Court of Hawaii did not err in deciding that there was no obligation upon Saito to sell to the appellant the pineapples produced from any lands which were leased or acquired by him after the date of the contract. The court said:

> "We have assumed in our consideration of the petition submitted to us that there was sufficient ground for equitable cognizance, and upon that assumption have given earnest consideration to the true interpretation of the contract between Saito and the Pineapple Company, and our opinion is that the Supreme Court of the territory appears to have been correct in holding that there was no obligation upon Saito to sell to the Pineapple Company pineapples produced from any lands which were leased or acquired by him after the date of the making of the contract" *(Hawaiian Pineapple Company, Ltd. vs. Masamari Saito et al.,* 260 Fed. 153, 154).

In its *"Assignment of Errors upon Appeal"*, the appellant has set forth sixteen (16) alleged errors. These sixteen alleged errors have again been set forth in full in appellant's brief. An examination of these sixteen errors will show that they really are substantially one and the same alleged error set forth in sixteen different ways. In various ways the appellant says that the Supreme Court of the Territory of Hawaii erred in holding that upon the evidence the contract in question should be construed as applying only to pineapples to be grown or owned or

controlled by Saito upon the lands held by him at the time of the execution of the contract referred to, and in rendering its decree accordingly.

The controversy has arisen because the appellee, Masamari Saito, after the date of his contract with the appellant, acquired other pineapple lands, and upon a subsequent date, April 1, 1918, sold the pineapples to be grown on those after-acquired lands to the appellee, Libby, McNeill & Libby of Honolulu, Limited. The injunction, which has been dissolved by order of the Supreme Court of Hawaii, was intended to prevent the further performance of the contract of April 1, 1918, between Saito and Libby, McNeill & Libby of Honolulu, Limited.

Upon these facts it is respectfully submited that the Supreme Court of the Territory of Hawaii was correct in holding that the contract in question did not apply to pineapples grown by Saito on lands acquired by him after the date of the execution of that contract.

A court in construing a contract may and must look first and primarily to the language used in the contract itself, and to all of its language, and then if anything remains ambiguous or unexplained, the court may permit itself to be aided in giving construction to such ambiguities by evidence of extraneous circumstances tending to explain but not to contradict the written terms of the instrument itself. We shall therefore consider the question of the construction of this contract in the following manner:

First. Giving our attention to the question as to what the language of the instrument itself really means.

Second. Considering what light is thrown upon the construction of the contract by evidence which was before the court in this case, bearing upon and tending to explain uncertain or ambiguous parts of the contract, if there were such parts, and

Third. Considering those well-established rules of law governing the construction of contracts which are applicable, each of which we contend contributes to make more sure that the construction adopted by the Supreme Court of the Territory of Hawaii is correct.

Finally, we shall briefly call the court's attention to the further contentions:

First. That the trial court in equity was without jurisdiction to decree or by injunction cause the specific performance of a contract to sell chattels, where, as in this case, the damage which would result from the failure to sell and deliver those chattels could be easily and accurately ascertained, there being therefor a perfectly adequate remedy at law.

Second. That this court at this time is without jurisdiction to hear and determine the questions presented by this appeal for the reason that the decree of the Supreme Court of Hawaii appealed from does not constitute a final adjudication of the rights of the parties, the cause having been remanded to the lower court for further proceedings consistent with the opinion.

Brief of Argument.

I.

THE CONSTRUCTION OF THE CONTRACT.

A.

The paragraphs in the contract imposing corresponding obligations upon the Pineapple Company and the Planter, show that the contract applied only to pineapples then owned or controlled or to be grown on lands then held by Saito.

In view of the obvious reasonableness of the contention that the contract referred to was intended by the parties to be a contract relative to certain known pineapple lands, and in view of the almost preposterous character of the suggestion that the Pineapple Company was really contracting for any pineapples which the planter might in any way have under his "control", during the period of four (4) years, which might mean every pineapple produced upon the whole Island of Oahu, the appellant has in its brief adopted the rather curious procedure of constructing an imaginary argument for the appellees, one which is not contended for by them at all, and then of proceeding to demolish that imaginary argument. Appellant says that it is our contention that the phrase "that he may own or control on the Island of Oahu" found in the paragraph outlining the obligation of the Pineapple Company refers to and modifies "present holdings" and not "pineapples", and that, therefore, the Pineapple Company agrees to buy only pineapples which may be grown by the planter and not pineapples which may be owned or controlled by him. They contend that this construction is inconsistent with

the subsequent paragraphs of the contract which define the pineapples contracted for as "pineapples grown, owned or controlled by the planter". This is not our contention. Our contention throughout has been that the Pineapple Company contracted to purchase all pineapples which might be grown by the planter on his holdings at Leilehua or all pineapples which might merely be owned or controlled by the planter on present holdings or at the present time, a construction which gives meaning to every word of the contract and which is entirely consistent with every provision of it. In order that our contention may be clearly understood in this connection it will be well to consider in detail the exact language of the contract, first considering the paragraph outlining the obligation of the Pineapple Company and second the paragraph outlining what we contend is the entirely mutual and corresponding obligation of the planter.

In the first place we have the undertaking of the Pineapple Company. The language of that undertaking is as follows:

> "The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable Smooth Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, or that he may own or control on the Island of Oahu."

This is clearly the undertaking of the Pineapple Company to handle and buy such pineapples, and only such

pineapple crops as were owned or controlled by the planter at the time of the execution of the contract. To give to the language used any other construction, would be to make it unreasonable and indeed practically impossible of performance.

The paragraph reads that under the conditions detailed, the Pineapple Company agrees to handle and buy all merchantable, smooth, Cayenne pineapples which the planter may grow on his present holdings at Leilehua, or on his present holdings elsewhere on the Island of Oahu, or all pineapples which he may now in any way own or control on the Island of Oahu.

To give the auxiliary verb "may" in the phrase "may own or control" a present tense is to give it the only construction which is at all consistent with reason.

Unlike many verbs, the auxiliary verb "may" does not show by its form the tense in which it is used. The tense may be present or it may be future, and in each case the context must be looked to, to determine which it is. The context in the present case shows clearly that the tense of the verb is present.

In the first place, the Pineapple Company undertakes to buy pineapples which may be grown on the present holdings at Leilehua, or the present holdings elsewhere on the Island of Oahu, and then to make sure that the planter shall not escape the obligation to sell all of the pineapples which the Pineapple Company has calculated within its estimate of what his holdings are, on the ground that the pineapples are not in fact grown by him, but are rather grown by others on some basis of

sharing in the profits, as is often the case among Japanese planters, a clause is added such as will cover and apply to the pineapples in the event that they are merely owned or controlled by the planter.

It is a well-known fact and a fact clearly within the understanding of the parties to this contract that a so-called Japanese Pineapple planter makes all sorts of arrangements with other Japanese for the cultivation of pineapples upon his holdings. It is rarely, if ever, the case, that a single Japanese planter with holdings of the extent of the holdings of Saito, himself plants, cultivates and harvests his own pineapples. Very frequently he himself has nothing to do with the actual growing of the pineapples upon his lands. With respect to a certain number of acres he will enter into some agreement, usually oral, with another Japanese for planting and cultivation upon some basis of sharing in the profits when the pineapples are finally disposed of in the market selected by the holder of the land. As to another tract or part of his holdings, another and perhaps an entirely different arrangement will be entered into with still another Japanese. The Pineapple Company buying the harvested fruit knows nothing about what arrangement may have been made by the planter for the growing of his fruit, and consequently all of the contracts, of the character of that now under consideration by this court, will invariably be found to contain a clause which will cover the pineapples proposed to be purchased in the event that they are not grown by the planter but are yet owned by him or their sale and marketing controlled by him. To say that in order to

give meaning to the words "may own or control" we must consider them as applying to pineapples which may come within the control of the planter in the course of time after the execution of the contract, the extent and quantity of which no one could tell, is simply to disregard the obvious meaning of the language and to give it a meaning clearly never intended by the contracting parties.

It is another well-known fact that the designation of localities on the Island of Oahu must necessarily at best be inaccurate. The term "Leilehua", for example, designates a general locality on the Island of Oahu, the exact boundaries of which are at best very indefinite. Just where Leilehua ends and another named locality begins no one can say within any degree of certainty. The only areas which have been surveyed with any degree of accuracy, as subdivisions of the land, are large areas known as "ahupuaas", usually extending from the crest of the mountains to the sea. Consequently, in designating localities, for the purpose of safeguarding the parties in the event that any dispute might arise as to whether or not the place designated has been accurately described, a phrase is very commonly inserted in indentures and contracts of this character, substantially in the language found in this particular contract, namely "or elsewhere on the Island of Oahu". To say, as contended in the appellant's brief, that the words must be interpreted to mean that the parties were contracting with respect to lands which might subsequently be acquired elsewhere, and the extent of which could not possibly be foretold, is to depart from the obvious meaning and

intent of the language and to adopt a construction unnecessary, unreasonable and clearly not within the contemplation of the parties.

The words referred to are furthermore inserted in these printed forms to take care of cases, frequently arising, where a single planter has holdings in various localities only one of which it is convenient to designate specifically, leaving the others to be covered by the general language "or elsewhere on the Island of Oahu".

The Pineapple Company says to the planter:

> "You have certain pineapple holdings at Leilehua, the extent of the crops from which we can very closely estimate. In fact we know that those holdings amount to approximately 150 acres and we have estimated the crops from those holdings at 1500 tons, of which 200 tons will be Class B fruit. We offer to buy the pineapples harvested from those holdings during the next four years. We do not know whether you propose to grow those pineapples yourself or what arrangements you may have made with other Japanese for the planting, cultivation and harvesting of the crops, but we do have every reason to believe that you control the harvests from those lands. Therefore, to make perfectly sure that we will get the pineapples which we are contracting for, and for the handling of which we will make arrangements, we offer to buy not only the pineapples in the event that you yourself grow them, but also in the event that you simply own or control them."

The planter accepts this offer. The parties have no way of knowing what pineapple lands the planter may thereafter acquire or what pineapples he may himself thereafter purchase or bring within his control, and the contract says absolutely nothing about such after-

acquired pineapples. It is, to say the least, highly unreasonable to suppose that, with canneries of definitely limited capacity, and faced with the necessity of definitely determining in advance the extent of its own plantings, and those of independent growers contracted with, will just meet its cannery capacity (Trans. p. 226), the Pineapple Company would deliberately bind itself to buy pineapples to an extent wholly undeterminable and possibly far in excess of what it could handle. The Pineapple Company did not do any such thing, and if there had been an overproduction instead of a shortage after the making of the contract, the Pineapple Company would have been the first to say so, in answer to any attempt to unload on it pineapples acquired after the execution of the contract and clearly not within the contemplation of the parties at the time of the execution of the contract.

When we notice that before the contract was executed by the Pineapple Company and returned to the planter, the company, through its clerk, wrote upon the face of the contract: "*Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)*" (Trans. p. 236), the fact that the Pineapple Company was contracting with respect to that 150 acres only becomes conclusively apparent. This phase of the matter we will consider a little more in detail later, at present we contend that wholly aside from it, it is thoroughly evident that the only reasonble construction to be placed upon the language found in the *clause imposing obligations on the Pineapple Company,* is that the company undertook to purchase only pineapples then owned or controlled or to

be grown on lands then held by the planter, the extent of which could be, and indeed had been, definitely estimated by the contracting parties. If there had been any other intent, it would have been perfectly easy to have expressed it. If the Pineapple Company had intended to contract for after-acquired pineapples, instead of using only the words *"may own"* which obviously speak as of the present only, it would at least have said *"may own or hereafter acquire"*.

Next we have the paragraph setting forth the corresponding agreement of the planter. We submit that there can be no serious question in the mind of anyone carefully considering the language of the contract, but that it was the intent of the user of the language to simply impose upon the planter a corresponding and an identical obligation to deliver and sell what the Pineapple Company had in the preceding paragraph undertaken to handle and buy. In fact, we find that the language of the second paragraph, so far as it concerns itself with designating what pineapples are covered by the contract is substantially identical with the language used in the first paragraph, the only difference being that an abbreviated form of expression is used, and certain modifying and explanatory words are left out.

The following comparison of the language used in the two paragraphs shows how evident it is that the second paragraph is merely an abbreviated form of the first, and that the intent was to impose thereby upon the planter, simply an identical and corresponding obli-

gation with that imposed by the preceding paragraph upon the Pineapple Company, namely the obligation to sell the pineapples to be grown on his then known holdings. We have numbered with the same numbers, those phrases which correspond with each other, and which convey an identical thought in the two paragraphs.

Obligation of Pineapple Company.	Obligation of Planter.
(*1* The Pineapple Company agrees that *1*) (*2* during the term of four years beginning May 1, 1916, and ending April 30, 1920, *2*) (*1* it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, *1*) (*3* all the merchantable, smooth, Cayenne Pineapples that may be grown by the Planter on his present holdings at Leilehua, or elsewhere on the Island of Oahu, *3*) (*4* or that he may own or control on the Island of Oahu. *4*)	(*1* The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained, *1*) (*3* all the merchantable, smooth, Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu, *3*) (*4* or that he may own or control on the Island of Oahu, *4*) (*2* during the term stated. *2*)

Below the phrases of Paragraph 2 are set out opposite the corresponding phrases of Paragraph 1.

Obligation of Pineapple Company.	Obligation of Planter.
1 The Pineapple Company agrees that * * * it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated,	*1* The Planter agrees that he will deliver to the Pineapple Company under the terms and conditions and with the exceptions hereinafter contained,

2 during the term of four years beginning May 1, 1916, and ending April 30, 1920,	*2* during the term stated
3 all the merchantable, smooth, Cayenne Pineapples that may be grown by the Planter on his present holding at Leilehua, or elsewhere on the Island of Oahu,	*3* all the merchantable, smooth, Cayenne Pineapples that he may grow at Leilehua, or elsewhere on the Island of Oahu,
4 or that he may own or control on the Island of Oahu.	*4* or that he may own or control on the Island of Oahu.

In the first paragraph the Pineapple Company has agreed that during the term of four years, beginning May 1, 1916, and ending April 30, 1920, it will handle and buy certain pineapples to be grown upon certain lands then held or which pineapples were then controlled by the planter. In the second paragraph, the planter has agreed that during the same term, he will deliver those same pineapples to the Pineapple Company.

Were it not for the fact that in the paragraph containing the planter's obligation the phrase "during the term stated" happened to be placed at the end of the paragraph rather than next to the verb which it modifies, it is doubtful if the present controversy would ever have arisen. It is, we believe, only because the phrase referred to was permitted to follow the phrase "or that he may own or control on the Island of Oahu" that the thought could have suggested itself that it might be possible to contend that the phrase "during the term stated" modified the preceding clause from which it

was separated by a comma, rather than the principal verb "deliver" corresponding to the principle verbs "handle" and "buy" which the same phrase modified in the paragraph fixing the obligation of the Pineapple Company.

The whole difficulty has apparently arisen because counsel for the appellant have insisted upon saying that the planter has agreed to deliver all of the pineapples which he may own or control during the term stated, rather than that he has agreed to deliver during the term stated all of the pineapples which he then owned or controlled.

It is submitted that such construction, aside from being entirely inconsistent with the rest of the contract, with circumstances attendant upon the execution of the contract and with reason and practice as indicated by the evidence, is contrary to the fundamental rules of grammatical construction. Had it been intended that the phrase, "during the term stated", should modify the verbs, "own or control", which immediately precede it, it would not have been separated from them by a comma. This conclusion becomes a practical certainty when it is observed that the corresponding phrase in the paragraph outlining the obligation of the Pineapple Company, namely "during the term of four years beginning May 1, 1916, and ending April 30, 1920", was made to modify the principal verbs of that sentence.

B.

The contract taken as a whole clearly refers only to pineapples then owned or controlled or to be grown on lands then held by the planter. Assuming for a moment that the two paragraphs imposing corresponding obligations upon the Pineapple Company and the planter, if taken alone, leave some doubt as to whether the contract is intended to apply to present or future holdings, a consideration of other parts of the contract immediately removes any such doubt.

It is a well established rule of law that a contract must be considered as a whole and that we may not consider this, that, or the other part or paragraph separate and apart from the whole. Counsel for the appellee have quoted in their brief an extract from *13 Corpus Juris* at page 525, setting forth this well-known rule of law, with which statement of law we entirely and heartily agree. The Supreme Court of Hawaii, in its opinion rendered in deciding this case, has laid particular emphasis upon this rule of law as being peculiarly applicable to the problem presented by this controversy (Trans. p. 186).

Assuming, then, that the two paragraphs referred to leave us in some doubt as to whether, for example, the verb "may" found in both paragraphs, used to designate pineapples which the planter "may own or control", is used in the present or in the future sense, let us see what light is thrown upon the question by other provisions of the contract.

1.

The provision for delivery f. o. b. cars at Leilehua shows clearly that the parties were contracting with respect to the then holdings of the planter, all of which were known to be at Leilehua.

The following provision of the contract shows that the parties had in mind only pineapples to be harvested from the lands then known to be at Leilehua and which pineapples were susceptible of being delivered F. O. B. railroad cars there, and indicates clearly that the parties did not have in mind fruit which might possibly come under the control of the planter in the future at any place on the Island of Oahu:

> "It is mutually agreed that the Pineapple Company will furnish F. O. B. railroad cars at Leilehua, Island of Oahu, lug boxes for the delivery of the fruit, and that the Planter will deliver said fruit F. O. B. railroad cars at Leilehua, Oahu, in said lug boxes, and that said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the Pineapple Company."

We do not believe that we can state our contention in this connection better than by using the language of the Supreme Court of Hawaii. The Chief Justice, speaking of this particular contract, in the opinion of the court, unanimously concurred in, says:

> "Their clear intention, we think, was to enter into a contract with reciprocal obligations on both sides, that is to say, the company was obligated to buy and the Planter was obligated to sell all the pineapples grown by the Planter on his holdings which he possessed at Leilehua or elsewhere on the Island of Oahu at the date of the making of the

contract, the location and extent of which were known to the parties at the time and the area of which was noted in writing upon the contract at the time of its delivery to the Company by one of is representatives as containing 150 acres. The correctness of this intention is made patent when the further clause in the contract which required the Planter to deliver all of said fruit F. O. B. railroad cars at Leilehua, Oahu, is considered. Assume that subsequently to the date of the contract Saito acquired land at Waimanalo or at some other locality remote from and inaccessible to Leilehua and that upon this land he grew and produced pineapples. In that event, if the construction urged by Complainant is to be adopted Saito would be required to deliver pineapples to the Company F. O. B. cars at Leilehua at fourteen dollars ($14.00) per ton, when from the geographical and physical conditions prevailing, which are within the common knowledge of all, the expense of transportation alone would far exceed that amount. In this connection, the rule of reasonableness of construction will apply, the effect of which is that where the language of the contract is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred. See Leschen & Sons Rope Co. v. Mayflower Gold Mining etc. Co., 173 Fed. 855." (*Hawaiian Pineapple Company. Ltd. v. Masamari Saito et al.*, 24 Haw. 787, 798, Trans. pp. 187-188.)

We contend that the fact alone that there was designated a particular place at which all the pineapples were to be delivered by the planter, shows conclusively

that the parties were contracting with respect to some definite pineapple crop or crops having a definite location. The fact that there was a stipulation that deliveries should be made at a particular place obviously precludes the possibility that they were making a contract applicable to any and all pineapples wherever they might be grown. Surely it is obvious that if the parties had had in mind pineapples which might be grown at Waimanalo, at Kailua, at Kahuhu or at other parts of the Island of Oahu where pineapples are grown but which are distant from Leilehua and separated from it by mountains, there never would have been the stipulation providing for delivery at any particular railroad station. Surely it is obvious that in that event the parties at least would have provided for delivery at other suitable places. We are unable to see how any other conclusion can be reached than that the contract was intended to apply solely to an estimated quantity of pineapples located and to be harvested at a definitely known place.

Counsel for the appellant have stated in their brief that Leilehua, Wahiawa and Pupukea are the only districts on Oahu in which pineapples are grown and which are tapped by the railroad, therefore, they say that the covenant as to the delivery of the fruit at Leilehua is "perfectly reasonable". Their statement, made quite outside of the record, is far from being accurate in fact. Other districts where pineapples are grown and which are tapped by the railroad are Kahuku, Waimea, Kawailoa, Waialee and Mokuleia. Be that as it may, we have certainly never contended that

there is anything at all unreasonble about this provision of the contract. Our contention in fact is that it is highly reasonable, and the only possible provision which we could expect to find in the contract in view of the fact that all of the pineapples contracted for were definitely known by the parties to be at Leilehua. Our contention, further, is that if the Pineapple Company had intended to buy Saito personally as a pineapple getter elsewhere on the Island of Oahu, they would have made some provision which would have made it economically possible for him to be valuable to them in that capacity, or if they wanted to buy all of the pineapples which he could profitably grow and deliver to the railroad, they would at least have made it possible for him to make deliveries at Wahiawa or Pupukea or other stations. It is of course true that many pineapples are grown on Oahu in places inaccessible to the railroad, in which case the transportation to the canneries is handled by motor trucks and other means of conveyance, and we say that if the contention of the appellant were well taken, this fact would likewise have been taken into consideration.

The theory of the appellant that in making these form contracts with pineapple planters, the Pineapple Company was buying men as pineapple getters rather than pineapples, is made the more obviously untenable by a consideration of this particular provision of the contract. If it was the idea of the company to buy all pineapples which Saito could get for it anywhere during the term stated, rather than the pineapples which it knew that he then had under his control, it

surely would never have tied him down to any particular railroad station as a place of delivery. The truth of the matter, of course, is that they were buying pineapples to be grown on a certain 150 acres of land, which land happened to be located at Leilehua, and, therefore, that they provided for delivery of the pineapples to be grown on that land at the railroad station at Leilehua. This particular provision of the contract is only one of the many indications which show beyond question that the contract was intended by the parties and has been expressed by them to apply to pineapples controlled by the planter at the time of the execution of the contract.

We cannot leave this phase of the argument without pausing for a moment to briefly consider the efforts of appellant to get around the obvious conclusion that, by designating as a definite place for the delivery of the fruit the station nearest which the pineapples contracted for were to be grown, the parties have shown beyond question that they had in mind and were contracting with respect to a certain crop of pineapples at that time definitely ascertained. In the first place, on page 21 of their brief, they have offered the curious suggestion that in some way, the manner of which they do not designate, Libby, McNeill & Libby is *estopped* from pointing to the fact that the paragraph in question clearly indicates that the parties had in mind the particular 150 acres known to be located at Leilehua, because the Libby Company have themselves incorporated in their contract for the purchase of the pineapples in question a similar provision for delivery F. O. B. cars at Leilehua. How in the world Libby,

McNeill & Libby can be estopped to urge that the Hawaiian Pineapple Company was contracting only with reference to pineapples grown, owned or controlled on lands known to be held by the planter at the time that its contract was made, by reason of the fact that the Libby Company has subsequently made a contract admittedly applying only to pineapples to be grown, owned or controlled upon lands held by the planter at the time that its later contract was made, we are wholly unable to see. The most casual examination of the contract of April 1, 1918, between Saito and the Libby Company will at once show that Libby was contracting only with respect to pineapples to be grown on lands definitely designated and the extent of which was perfectly ascertained. In fact, the description of the lands to be covered by the Libby contract was in each instance set out definitely by metes and bounds (see pages 81, 82, 83 and 84, Transcript of Record). Libby, McNeill & Libby has never for a moment contended that their contract of April 1, 1918, covers any pineapple lands which may be acquired after the execution of the contract. Of course, Libby's contract contained the clause which protected it in the event that the pineapples were not grown, but were merely owned or controlled by the planter, just as we have indicated is done in the case of all such contracts. And there is also in the Libby contract the clause protecting the company in the event that the designation of the locality where the lands are located may be inaccurate, by the use of the words "or elsewhere". As has been pointed out, these form contracts are prepared for use

among planters who may have lands scattered here, there and everywhere on the Island of Oahu. The designation of localities on Oahu must be at best inaccurate. Here and there upon the map are found names sometimes of railroad stations and sometimes of general localities, the geographic extent of which is in no way determined. It is very difficult to say of any particular piece of land that it lies in any particular named place, and there was no reason why Libby should fail to protect itself in this regard in this particular instance any more than in the case of any other pineapple planting contract. Certainly, there is no possible basis for the suggestion that Libby is estopped by any representation which it may have made to Saito, from freely and fully urging before this court any contention regarding the obligations existing between Saito and the Hawaiian Pineapple Company.

In the second place, on pages 21 and 22 of its brief, appellant urges that Saito would not be "prejudiced" by the provision for delivery at Leilehua for the reason that he probably would not want to grow pineapples on other parts of the island, anyway, for example that it would be highly improbable that he would care to grow pineapples at Waimanalo, suggested as a possibility by our Supreme Court. This suggestion of appellant simply and entirely ignores the argument of the Supreme Court and is, furthermore, based on an assumption for which there is no possible basis. Speaking outside of the record, as counsel have done themselves in this regard, everyone in Hawaii knows that scores of Japanese are reaping large profits in the

growing of pineapples at Waimanalo. How can this court, or how could any court for that matter, say that Saito would not want to engage in that line of business during the four-year period specified? But wholly aside from the question as to whether or not Saito probably would or would not want to grow pineapples at Waimanalo, we have the unanswered argument of the Supreme Court of Hawaii to the effect that to close to a man the door to any line of profitable endeavor is necessarily some hardship, and that courts will invariably construe contracts if possible in such a way as to make them fair, equitable and such as prudent men would ordinarily enter into. Appellant's argument also ignores the contention that as a matter of reason, if the parties had had in mind the possibility that Saito might acquire other pineapple lands elsewhere later, and if they had desired to include other pineapple lands within the operation of the contract, they obviously would have made a provision providing in some way for the contingency contemplated.

In the third place, counsel for the appellant present this argument. They say in substance:

> "if the construction contended for by us is unreasonable because it would make the contract unreasonable and unfair under contingencies which might well arise, still your contention is equally unreasonable because it provides for delivery at Leilehua and it would cover present holdings at Waimanalo."

This argument, we say, is a mere quibble. It absolutely refuses to recognize the facts known to the parties, and known to this court. *There were no present*

holdings at Waimanalo. There was in fact in the contemplation of the parties a definite area of 150 acres known to be located at Leilehua. The parties were contracting with respect to that 150 acres. Indeed, that fact was noted in writing upon the face of the contract itself. The provision for delivery F. O. B. railroad cars at Leilehua was in truth the only reasonable provision which the parties could have made in this respect. We can only suggest that the character of appellant's argument in this connection indicates the weakness of its position.

Finally, appellant offer the contention substantially summed up by the following language found on page 26 of its brief:

> "If he did not care to conduct his business in an ordinarily businesslike manner, as the contract assumed that he would do, then his was the penalty."

Can any court say that there would be anything unbusinesslike in Saito's endeavoring to extend his activities to the extent of engaging in pineapple growing either himself or through others at Waimanalo, at Kahuku, at Waimea, or at other places on the Island of Oahu during the four-year period designated? We do not, furthermore, believe that this court will adopt the view that it was the intent of the parties to this contract to impose any penalty on either of the parties in the event that they might desire to extend their commercial activities. We will indicate later that the law is clearly to the effect that every effort must be made to construe a contract so that it will not bear a construction such as that contended for by the appellant

in this respect. Courts, and particularly courts of equity, look with extreme disfavor upon any suggestion of an attempt to penalize a person for legitimate business endeavor. If it had been a fact that this contract had really purported to say to Saito:

> "During the period of four years you may not extend your holdings to parts of the Island of Oahu remote from Leilehua. During the period of four years your activities must be confined to this little 150 acres concerning which we have contracted with you or to lands in the immediate vicinity."

Then we say that the contract would be such a contract as a court of equity should not enforce by decree or indirectly by injunction, but it was not such a contract, and we contend that our position in this regard is abundantly supported by the plain meaning of the language of the contract and by every legal rule of construction applicable to the case.

2.

The endorsement placed on the last page of the contract by the clerk of the Pineapple Company prior to its execution by the Pineapple Company and delivery to the planter, "Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)", considered as a part of the contract itself. If it is a part of the contract it is decisive of this dispute.

The evidence pertinent to this particular phase of the matter is set forth in the following extracts taken from the statement of the evidence now before this court:

> "The blanks were subsequently filled in by a clerk of the Hawaiian Pineapple Company, Limited, prior to the execution of the contract by the company, and at or about the same time the following endorsement was made upon the contract near the bottom of the last page below the signatures by a clerk of the Hawaiian Pineapple Company, Limited, to wit: *'Approximately 150 acres. Approximately 1500 tons (Class B 200 tons).'*" (Trans. p. 236.)
>
> "In May, 1916, the respondent Saito had smooth, Cayenne pineapples planted on lands described in his two leases from the Oahu Railway & Land Company, Limited. * * * All of Saito's holdings at that time were at Leilehua, Oahu, and comprised approximately 150 acres of arable land" (Trans. p. 228).

The evidence shows that this particular endorsement was placed upon the last page of the contract at about the same time that the blanks in the printed form of the contract were filled in. The evidence further shows that the contract as finally executed by the Pineapple Company and delivered to Saito bore on it the endorsement in question. Under the evidence it may well be contended that this endorsement was actually a part of the contract itself. If this is so, it ends all discussion of the problems presented by this appeal, for it then definitely fixes for the purposes of the contract the extent of the holdings intended to be covered by the contract. It makes impossible the contention that the contract applies to anything but the 150 acres referred to. If the Pineapple Company and if the planter were contracting only with respect to this 150 acres, we have no further problem of construction before us. We contend that by the endorsement just as by filling in

the blanks, the Pineapple Company made complete the contract which had theretofore been incomplete. The company delivered the contract to Saito in its completed form, and thereby indicated to him that they had bound themselves only with respect to the pineapples to be grown on the 150 acres then held by him at Leilehua.

The law in this regard is well stated in the case of *Gray v. Williams,* as follows:

> "The general rule is that if a memorandum written on an instrument in the margin or at the foot is made before or at the time of its execution, it is considered a part of it; and if it affects the operation of the terms of the body of the instrument, it is a material part" (*Gray v. Williams,* 99 Atl. 735 at page 739).

The statement of evidence before this court shows that this memorandum showing the lands and pineapples covered by the contract was made at or about the same time as the blanks in the printed form were filled in, which was prior to the execution of the contract by the Hawaiian Pineapple Company. The evidence shows that the memorandum was made by the clerk of the Hawaiian Pineapple Company authorized to fill out and complete the contract for it. The memorandum is clearly explanatory of the meaning and scope of the contract and definitely defines the pineapples purchased. It explains and effects the operation of the terms found in the body of the instrument, and under the rule of law above set forth, it was a material part of the contract itself. By signing the contract with the blanks *not* filled in and delivering it to the Hawaiian Pineapple Com-

pany, Saito authorized the company to make the contract complete by filling in the blanks and adding such endorsement or memoranda as it might see fit subject to his subsequent acceptance of the contract upon its redelivery to him. The company saw fit to definitely advise Saito that it was binding itself only as to his 150 acres from which it estimated a crop of 1500 tons by an endorsement in writing plainly made upon the face of the contract just below the signatures of the parties.

The rule of law referred to is again set forth in the case of *Wheelock v. Freeman,* as follows:

> "But there is no magic in the word memorandum. And it has often been decided that when words are written on an instrument which qualify and restrain its operation they constitute a part of the contract" (*Wheelock v. Freeman,* 13 Pick. 165, 168).

There are, for example, great numbers of cases involving unsigned memoranda placed upon the backs of promissory notes. It is invariably held that where these memoranda explain or make more complete the terms of the body of the instrument and where they were placed upon the instrument prior to its execution and delivery, they are as much a part of the contract evidenced by the instrument as are any of the terms found over the signature. A number of these cases have been collected in a note appended to the case of *Kurth v. Farmers & Mechanics' State Bank,* 15 L. R. A. N. S. 612. All of these cases proceed upon the theory that it is not a fatal objection to any particular language of the contract, that it happens to follow rather than to precede

the signatures. If the so-called addendum was on the contract at the time of its execution by the party to be bound and its delivery to the other party, as was the case with our contract, then, if it obviously explains or modifies the terms found in the body of the instrument, it is a part of the contract itself. We submit that the phrase, *"Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)"*, placed on the face of the last page of the contract between the Hawaiian Pineapple Company and Saito was as much a part of the contract as were, for example, the words designating the place for the delivery of the fruit, which were placed upon the face of the contract at the same time. If this phrase was a part of the contract, we need go no further, because obviously they definitely show that the contract applied only to the 150 acres, which the evidence shows that Saito then held and that it did not apply to any after acquired lands or pineapples.

Counsel for the appellant in their brief have laid great stress upon the rule of law that a contract must be considered as a whole. With that rule of law we entirely agree. In their brief the only argument which they have predicated upon this rule of law has been the argument to the effect that an imaginary contention, and one not made by the appellees at all, is unfounded. They have said that we contend that the contract covers only pineapples grown by the planter and not those owned or controlled by him and that in considering the contract as a whole it appears in subsequent paragraphs that the pineapples covered by the contract are defined as "pineapples grown, owned or controlled by the planter".

They have gleaned nothing other than this from their consideration of the contract as a whole. In truth, our contention is quite the reverse and accords entirely with the language used in the subsequent paragraphs of the contract and referred to by appellant. Our contention is that the contract covers both pineapples grown by the planter and pineapples merely owned or controlled by him, and further that it is the obvious intent of the language of the contract that it shall apply only to pineapples to be grown upon lands held by the planter or pineapples owned or controlled by the planter at the time of the execution of the contract. It is our contention that the only possible ambiguity in the whole contract is found in the question as to whether the verb "may" used in the phrase "may own or control", is used in the present or in the future tense and we say that the contract considered as a whole clearly shows that it is used in the present tense. It is our contention that a consideration of the contract as a whole, containing as it does a provision for the delivery of the fruit at the station nearest which the lands within the contemplation of the parties were located, and with the exact acreage and probable crop noted on the face of the contract, leaves no doubt but that the contracting parties in using the language which they did use, intended to buy and sell only pineapples to be grown on the 150 acres in question and had no intention at all of purchasing and selling any and all pineapples which Masamari Saito might in any way get under his control upon the whole Island of Oahu during the period of four years.

II.

EVIDENCE OUTSIDE OF THE CONTRACT ITSELF EXPLANATORY OF ITS MEANING. THE EXTRINSIC EVIDENCE.

A.

The circumstances under which the contract was made show clearly that the parties intended to contract with respect to a then definitely ascertained quantity of pineapples.

On page 30 of its brief, appellant has quoted from *Corpus Juris* the very wholesome rule of law that a contract should be construed in the light of the circumstances surrounding the parties at the time of its execution. It is another thoroughly established rule of law that a contract shall be construed if possible so as to make it reasonable and such a contract as reasonably prudent business men would make. With these rules of law in mind, we will consider the facts as shown by the statement of evidence indicating the circumstances under which the contract was entered into.

In May, 1916, after a period of overproduction having extended over two years or more, the canneries, including the cannery of the Hawaiian Pineapple Company, were

> "carrying a heavy stock of canned pineapples from previous years which they had been unable to sell" (Trans. pp. 227-228).

The cannery capacity of the Hawaiian Pineapple Company was and is limited. The company estimates in advance for crops of its own planting in accordance with the extent of the contracts which it makes with independent growers. The period of growth from planting to maturity is from eighteen months to two years.

(Trans. p. 226.) All of these circumstances we contend indicate clearly that the Pineapple Company, acting in a prudent and businesslike manner, would have every reason in the world for knowing in advance exactly the quantity of pineapples which it was purchasing from any particular grower and for contracting with respect to a definitely ascertained quantity of pineapples only. With a large surplus on its hands and faced with the necessity of regulating as far as two years in advance the extent of its own plantings in order to avoid having on its hands more pineapples than its cannery could handle, it would have been the height of folly for the Pineapple Company to have contracted with any planter or dealer for all pineapples which that planter or dealer could get under his control anywhere on the Island of Oahu during a period of four years.

Placing itself as near as may be in the situation of the parties at the time of the execution of the contract, as suggested by the appellant, the court sees this situation existing in May, 1916: The Pineapple Company having decided to make further contracts with independent growers to make up for a deficiency which it had ascertained that there would be during a period of years between the quantity of pineapples which it planned to grow itself and the pineapples which its cannery could handle during that period of years, sent out its agent to make contracts with independent planters for a certain quantity of pineapples here and a certain other quantity of pineaples there until he should have contracted for pineapples to such an extent as would just correspond with its cannery capacity. This

agent came to Masamari Saito with a blank form of printed contract already prepared by the Hawaiian Pineapple Company. That blank form of contract contained the usual stipulations which would protect the company in the event of inaccuracy in the description of the locality and in the event that the planter was not really growing the pineapples which he controlled. The company's agent went over Saito's holdings and found that they comprised approximately 150 acres from which he estimated that the crop would be approximately 1500 tons, of which 200 tons would be Class B fruit. The company's agent agrees with Saito to buy that fruit and Saito agrees to sell it. Saito had no other fruit to sell and no other fruit was within the contemplation of the contracting parties. Upon the closing of the negotiations the blank form of printed contract was presented to Saito and he was asked to sign, which he did. It appears that Saito is a Japanese who does not understand the English language, and whether or not the contract was translated to him, we do not know. In signing the contract in blank, Saito trusted to the Pineapple Company to fill it out and complete it in such a way as to make it express what he understood the contract to be. Under such circumstances, as we will point out later, the law says that in the event of a subsequent controversy the contract shall be construed most strongly against the person dealing in the most advantageous position. The law particularly says that where a contract is prepared entirely by one of the parties and the language used is his language, especially where it is on a printed form,

in the event of a subsequent controversy, the contract shall be construed most strongly against the party using the language employed. After having procured Saito's signature to the contract in blank the agent took it back to the officials of the Pineapple Company, indicated to them that he had purchased the crops to be grown upon a tract of 150 acres at Leilehua which crops would approximate 1500 tons of which 200 tons would be Class B fruit. The clerk of the Pineapple Company thereupon completed the contract by filling out the blanks designating "the name of the place where the lands to be covered by the contract were located" (Trans. p. 236), the date, the name of the planter, his place of residence, the place at which the delivery of the fruit was to be made, and, so that there could be no question, by noting at the end of the contract the exact extent of the lands covered by it and the estimated quantity of pineapples. The officials of the company then having added the crops of this 150 acres toward the total of the cannery capacity which would mark the limit of their contracts with independent growers, signed the contract and it was delivered to Saito in its completed form. We believe that it would be difficult to find a set of circumstances surrounding the execution of a contract which could more definitely indicate an intent to confine its application to a definite subject-matter within the contemplation of the parties at the time of the execution of the contract, than do these circumstances.

Apparently the only argument that counsel for the appellant have predicated upon what they term the

surrounding circumstances is the argument that because the pineapple business was emerging from the precarious situation in which it had been for a number of years, therefore the Pineapple Company would want to buy all of the pineapples which it could possibly get even though their quantity might far exceed what its cannery could handle. In view of what really were the circumstances attendant upon the execution of the contract showing as they do a clear intent to deal with respect to a definitely ascertained quantity of pineapples then controlled by the planter, we do not feel that this argument of appellant is worthy of serious consideration.

B.

The endorsement made on the contract by the Hawaiian Pineapple Company, "Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)", even though considered not an actual part of the contract, is evidence clearly showing the intention of the parties at the time of entering into the contract, to contract with respect to the 150 acres referred to only.

> "Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. No matter how broad or how general the terms of the contract may be, it will extend only to those matters with reference to which the parties intended to contract."
>
> * * * * * * *
>
> "Contracts must be construed with reference to the intention of the parties at the time of entering into the contract" (13 *Corpus Juris* 523).

In this connection it is our contention that even though the endorsement designating the acreage and the pineapples coverel by the contract be considered not as an actual part of the contract, still the fact that such an endorsement was made upon the contract prior to its execution by the Pineapple Company and prior to its redelivery to the other contracting party, is a fact clearly indicating the intent of the parties, and particularly of the Hawaiian Pineapple Company, which now seeks to repudiate that intent, to confine the contract to the then known holdings of Saito. It shows conclusively the contemporaneous construction placed upon the contract by one of the parties to it and acquiesced in by the other party by performance under the contract after this limitation upon its effect had been called to his attention by the note in writing referred to.

It must, furthermore, be remembered that this particular contract was executed in duplicate (Trans. p. 228). The endorsement in question was made upon the contract; not only upon the copy which was kept by the Hawaiian Pineapple Company, but also upon the copy which was redelivered to Saito. The evidence clearly shows that it was not merely a casual note, and, indeed, even if it had been, its value as indicating the construction placed upon the contract by the Pineapple Company would not have been materially less. The fact that this endorsement was placed upon the contract in writing prior to its execution, and the further fact that the contract was redelivered to Saito with the endorsement clearly upon its face are facts which coincide exactly with the

actual making of the contract itself. They are facts which show the intent of the parties as it then was, and which show the unmistakable construction put upon the contract by one of the parties at the time when evidence of this kind is most valuable, namely, at exactly the time that the contract was made. Counsel for the appellant have seen fit to fail to even attempt to meet appellee's argument based upon the significance of the endorsement in question, although they knew that the appellee has always urged this feature of the matter as being highly significant, and although it is referred to by the Supreme Court of Hawaii in its opinion from which this appeal has been taken. We can only assume that they can find no satisfactory answer to the contention of appellee in this connection. Indeed, we do not see how it is possible to escape the conclusion that the Hawaiian Pineapple Company would never have plainly written on the face of two duplicate copies of a contract language clearly indicating the extent of the lands to be covered by the contract, unless it had been their intent to confine the contract to those lands, and to avoid any question by definitely settling any uncertainty which might exist by virtue of ambiguities in the body of the instrument. We do not feel that it is necessary to cite further law to the effect that facts showing the construction put upon a contract by the parties contemporaneously with its execution are evidence of a vitally important character.

C.

The fact that Saito sold pineapples from a single small twenty-acre lot, a part of the after acquired premises, to the Hawaiian Pineapple Company at the same price as the prices stipulated in his previous contract is of no value as showing any construction placed upon the contract of May 18, 1916. The arguments of appellant relative to the construction of the contract by the parties considered.

Appellant lays particular stress upon the fact that prior to concluding negotiations for the disposition of the pineapples to be grown upon his after acquired premises as a whole, Saito sold the second or third ratoon crop harvested from lot 1, comprising twenty (20) acres, to the Hawaiian Pineapple Company at the same price as the prices stipulated for the crops to be grown on the lands covered by his previous contract with that company. The force of appellant's argument in this connection dwindles into insignificance when we consider the real facts and circumstances. The statement of evidence shows that the only after acquired land which had any harvest at all prior to 1918, when Libby, McNeill & Libby purchased the crops from these after acquired lands, was lot No. 1, one of the six lots comprising the after acquired leaseholds. The statement of evidence further shows that this lot was a tract of only twenty acres and that the crop of 1917 was a second or a third ratoon crop. Just how much twenty acres would yield after the plants had run for two or three seasons we cannot say. We feel safe, however, in suggesting that the quantity would not be large. Furthermore (and this is a fact which appel-

lant has entirely overlooked), it cannot possibly be said from the statement of the evidence that there was at that time any other cannery purchasing pineapples in that locality or anyone else to whom Saito could have profitably disposed of the pineapples prior to the time that Libby, McNeill & Libby entered the field at Leilehua and concluded their contract with him under date of April 1, 1918. Counsel for the appellant say that Saito placed a construction upon the contract by selling pineapples to the Hawaiian Pineapple Company in 1917 at a base price for class A fruit of fourteen dollars ($14.00) per ton, and in not selling to some one else at a higher price, but they do not show that there was anyone else negotiating in the locality to whom he could have sold. Counsel say that it is significant that Saito made no attempt to contract elsewhere for the sale of his after acquired pineapples when the record is absolutely silent in this regard, and so far as this court knows, he may have made every effort, and may indeed have known that Libby, McNeill & Libby would be available as a purchaser later. There certainly was nothing unreasonable in his delaying the making of a contract, disposing of his after-acquired pineapples, when the price of pineapples was rising rapidly and there was no necessity for disposing of any pineapples excepting those from Lot 1, until 1918.

Appellant further offers the suggestion that, because the Hawaiian Pineapple Company loaned money to Saito and took as security for the loan a mortgage on his after-acquired leaseholds, it, therefore, follows that they have construed their contract of May 18, 1916,

to include those after-acquired leaseholds. Such a contention is wholly unwarranted. The fact was that Saito wanted to borrow money, and to whom was it more natural that he should turn than to the Hawaiian Pineapple Company with which he was getting credits from time to time by the delivery of fruit. The Hawaiian Pineapple Company, finding the security perfectly good, and knowing that the loan could be promptly taken up by deliveries of fruit under its existing contract from the lands which Saito then had, thinking doubtless that the pineapples to be grown on the subsequently acquired lands would later be available for it should it see fit to contract for them, made the loan. We see nothing in the placing out of six thousand dollars ($6,000.00) at 8% on perfectly good security, in a short time loan, which would indicate that even at that time the Pineapple Company thought that it had a contract which would cover the after-acquired lands. It is doubtless true that the Pineapple Company figured that, without taking any risk at all it was making available for itself more pineapples which it could later buy if the circumstances justified, or which it could leave if pineapples again became a drug on the market. The trouble has arisen because the appellant failed to negotiate for these pineapples until after they had been purchased by the appellee.

The only other so-called act of the parties construing the contract, which appellant points to, is found in the fact that the Hawaiian Pineapple Company's interpreter testified that Saito had said, at a time

subsequent to the arising of the present controversy, that he thought at one time that the contract with the Hawaiian Pineapple Company did cover after-acquired pineapples. Saito under oath denied that he ever said any such thing. But even if he had said it, of what value would it be under the facts known to the court? Saito, an illiterate Japanese, probably never did have any very definite idea as to the legal scope and effect of the contract into which he entered. Indeed the evidence shows that he signed it in blank, authorizing the Pineapple Company to make it complete, which it did, and the evidence shows that in making it complete, it indicated clearly the lands to which the contract applied. The fact that Saito at some time subsequent to the execution of the contract, through perhaps an imperfect translation and understanding of it, may have arrived at the conclusion that it covered after-acquired pineapples, if indeed it ever was a fact, shows, we submit, literally nothing as to the actual intent of the contracting parties at the time that the contract was made, which is the material thing with which this court is concerned.

It may well be suggested in this connection that the very fact that Saito offered these particular pineapples to Libby, McNeill & Libby at all, is an obvious indication that he must have thought that he had something which he could sell to them.

We respectfully submit, therefore, that there were no acts of the parties extending over a period of two years, or over any period which are in any instance at all inconsistent with the theory that the contract of May

18, 1916, covered only pineapples to be grown, owned or controlled by Saito on the lands which he held at the time of the execution of that contract. We submit, that in truth the action and conduct of the parties after the making of the contract and particularly at the time that it was made, simply aid in making more certain that the obvious meaning of the language of the contract construed in the only way consistent with reason, was indeed at all times the construction which the parties themselves placed upon it.

Of course, in considering any evidence claimed as showing a practical construction put upon the contract by the parties, the following well established rule of law must be borne in mind:

> "But practical construction is not conclusive, and may be considered only when the contract, *considered in the light of surrounding circumstances*, leaves the proper construction in doubt" *(13 Corpus Juris* 548, and cases there cited).

It is our contention that the contract in question considered in the light of surrounding circumstances, leaves no doubt whatever but that it was not intended to cover any pineapples which might be acquired after the date of its execution. Further, even if there had been any doubt, every act of the parties which might in any way be said to show a construction of the contract, removes that doubt and indicates that they were contracting with respect to a definitely ascertained quantity of pineapples to be grown, owned or controlled by the planter upon the 150 acres known to be held by him at the time that the contract was made.

III.

ALL RULES OF LAW GOVERNING THE CONSTRUCTION OF CONTRACTS WHICH ARE APPLICABLE TO THIS CASE CONTRIBUTE TO MAKE MORE SURE THAT THE CONSTRUCTION CONTENDED FOR BY THE APPELLEES IS CORRECT.

In this section of our brief, we propose to briefly refer to those well established rules of construction which are applicable to this case, all of which, it is submitted, support the conclusion that the contract in question properly construed, applied only to pineapples to be grown on the 150 acres then known to be held by Saito.

A.

Where any doubt arises as to the construction of a contract, it must be construed most strongly against the person using the language employed, and this is particularly true in the case of a printed form prepared by one of the parties.

The rule of law referred to is so thoroughly established that we need merely notice it in passing, as indicating that if there really is any ambiguity in the present contract and if there really can be any doubt as to whether the Hawaiian Pineapple Company purchased a definitely known quantity of pineapples or a wholly indefinite quantity of pineapples to be later acquired, then that ambiguity and that doubt must be settled against the Hawaiian Pineapple Company, the user of the language, who prepared the printed form upon which the contract was executed.

This rule of law is set forth in *Corpus Juris* as follows:

"Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises."

* * * * * * * *

"The rules just stated are of course peculiarly applicable where the contract is on a printed form prepared by one of the parties" (*13 Corpus Juris,* 545, and cases there cited).

The rule referred to has been variously stated by various courts. The following are a few examples:

"As has been stated, the contract entered into was upon a regular printed form of proposal, prepared and used by the Wolf Company in the sale of its ice manufacturing machinery, and, if there is doubt as to the true meaning of the contract, it should be construed most strongly against the Wolf Company.

In Christian v. First Natl. Bank (8th Circuit) 155 Fed. 709, 84 C. C. A. 57, Judge Van Devanter speaking for the Court, said: 'The language of the agreement is that of the plaintiff and his co-depositors, and, if there be any doubt as to its true meaning, it is both just and reasonable that it should be construed most strongly against them. Noonan v. Bradley, 9 Wall. 394, 407, 19 L. Ed. 757; Texas and Pac. Ry. Co. v. Reiss, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358; Osborne v. Stringhan, 4 Sd. 593, 57 N. W., 776' " (*Mt. Vernon Refrigerating Co. v. Fred W. Wolf Company,* 188 Fed. 164, 168).

And again:

"The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words

> should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the Court is to interpret such language, it is, as stated by Mr. Justice Harlan in delivering the opinion of the Court in Natl. Bank v. Ins. Co., 95 U. S. 673, 679: 'both reasonable and just that its own words should be construed most strongly against itself' '' (*Texas and Pacific Ry. Co. v. Reiss,* 183 U. S. 621, 626).

And again:

> ''If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party, who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the rights of the parties,—that one should be favored which standeth with the right'' (*Noonan v. Bradley,* 76 U. S. 394, 407).

We feel that there can be no question as to the applicability of this rule of law to the present case. The statement of evidence before this court shows that the contract was on a printed form prepared by the Hawaiian Pineapple Company and further that it was completed by words filled in by the Hawaiian Pineapple Company, so that every word used in the contract was used by the appellant. If any doubt exists as to the proper construction to be placed upon the contract, that doubt should and must, we submit, be resolved in favor of the appellees.

B.

Particular language confining or limiting the operation of a contract governs more general language found elsewhere in the contract.

This rule of law is laid down in *Corpus Juris* as follows:

> "The Court will restrict the meaning of general words by more specific and particular descriptions of the subject matter to which they are to apply" (*13 Corpus Juris,* 537, and cases there cited).

The rule is otherwise stated as follows:

> "It is a rule of construction that, if there is a repugnancy between general clauses and more detailed and specific clauses, the latter will govern" (*English v. Shelby,* 172 S. W. 817, 819).

Thus, in the case at bar, if it may be said that the language of the contract is anywhere general enough to include after acquired pineapples, then that general language must give way to the more specific language found in the contract designating "present holdings" and indicating the acreage intended to be covered by the contract.

C.

Where doubt exists, that construction of a contract which will make it reasonable and just should be adopted by the court.

This rule is stated by Page as follows:

> "As between two constructions, each probable, one of which makes the contract fair and reasonable, and the other of which makes it unfair and

> unreasonable, the former should always be preferred'' (*Page on Contracts,* 2nd Ed., Vol. 4,, p. 3549, and cases there cited).

This rule of law has been otherwise and very aptly stated as follows:

> "Moreover, where the language of a contract is obscure or ambiguous, or where its meaning is doubtful so that it is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally make, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it unusual, unfair, or an improbable contract. See Leschen & Sons Rope Co. v. Mayflower Gold Mining, etc., Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. N. S. 1; Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391; Jacobs v. Spaulding, 71 Wisc. 177, 361, N. W. 608'' (*Big Muddy Coal & Iron Co. v. St. Louis-Carterville Coal Co.,* 158 S. W. 420, 424 (Mo.).

Numerous other cases might be cited holding to the same effect. The rule of law enunciated is indeed axiomatic. It is our contention that to construe the contract of May 18, 1916, to mean that the Hawaiian Pineapple Company with a limited cannery capacity, had deliberately contracted for any and all pineapples which Saito might in any way get under his control on the whole Island of Oahu during the four-year period, and to construe it further to mean that Saito would be bound to deliver all pineapples which he might thereafter grow, own or control to the Hawaiian Pineapple Company at Leilehua, at whatever economic

loss, would be to construe the contract in such a way as to make it highly unreasonable, unfair and such a contract as prudent men obviously would not make. It is our further contention that the construction contended for by the appellee, namely that the contract was for a definite quantity of pineapples to be grown on the planter's then holdings, known to be at Leilehua, and to be delivered at the railroad station at Leilehua, is a perfectly reasonable construction, and makes the contract such as prudent men would naturally make.

D.

Where part of a contract is printed and another part is in writing, the part in writing must prevail.

This rule of construction is stated by Page as follows:

> "If the contract is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay more attention to the written parts than to the printed parts. Accordingly if the written provisions cannot be reconciled with the printed the written provisions control, at least if there is no evidence tending to show that the printed provisions express the real intentions of the parties" (*Page on Contracts,* 2nd. Ed. Vol. 4, p. 3531).

The rule has been otherwise stated as follows:

> "It is a well settled rule of law that if there is a repugnancy between the printed and the written provisions of the contract, the writing will prevail. It is presumed to express the specific intention of the parties. Hagan v. Scottish Ins. Co., 186 U. S. 423" (*Thomas v. Taggart,* 209 U. S. 385, 389).

It is our contention, in this connection, that the written provision designating "Leilehua" as the place at which the lands to be covered by the contract were located, must govern the more general language "elsewhere on the Island of Oahu" obviously inserted in the printed form to provide against inaccuracies in the description of localities, or to provide for the contingency that very frequently a planter would have lands located in several localities, only one of which could be conveniently designated in the contract leaving the others to be covered by the general term "or elsewhere on the Island of Oahu". It is our further contention that the written phrase designating "*Approximately 150 acres. Approximately 1500 tons (Class B 200 tons)*", must govern as designating in writing the specific lands intended to be covered by the contract.

E.

Where under a proposed construction of a contract, contingencies might arise which would render performance impossible, that construction cannot be adopted as against a construction where there could be no impossibility of performance.

This rule of law has been stated in *Corpus Juris* as follows:

> "No matter how clear the ordinary significance of the words, it has been held that they must not be given a meaning which when applied to the subject matter of the contract will render performance impossible" (*13 Corpus Juris,* 540).

The rule has been otherwise stated as follows:

> "The intention of the parties must necessarily govern in the construction of all contracts, and it will never be presumed that persons occupying a contractional relation intended that an impossible thing shall be done" (*Bingell v. Royal Ins. Co.*, 87 Atl. 955, 957 Pa.).

If the construction contended for by the appellant were to be adopted namely that the contract applied to any and all pineapples which Saito might in any way get under his control anywhere on the Island of Oahu, then there might well arise a situation under which it would be practically impossible for Saito to perform his part of the agreement. This would occur notably were he to plant or acquire pineapples at points distant from Leilehua, when under the circumstances it would be economically impossible for him to comply with the provision of the contract providing for delivery at Leilehua. On the other hand under the construction contended for by the appellee, no impossibility of performance could conceivably arise, but the performance of the contract would follow naturally the prudent and businesslike intent of the parties.

F.

A contract will be construed if possible in such a way that the obligations and counterobligations imposed will be mutual.

In view of the really unambiguous meaning of the language used in the first paragraph hereinabove referred to, namely the paragraph imposing obligations upon the Pineapple Company, and in view of the unrea-

sonableness of the contention that the words "may own or control" should be read as meaning "may *hereafter* own or control", in their argument before the Supreme Court of Hawaii the appellant took a position which it has now apparently abandoned. Counsel admitted, for the purpose of the argument, that the paragraph referred to applied only to pineapples then owned or controlled by the planter, but they said that the next paragraph imposing obligations upon the planter, bound him to sell more than the previous paragraph had bound the company to buy, namely after acquired pineapples. In other words they said, that the intent was that as to after-acquired pineapples the company would have the option to take or refuse them. To meet the possibility that this argument may again be urged before this court, we merely quote the following well known rules of law:

> "As between two possible constructions, one of which makes the instrument an executory contract and the other of which makes it an option, the Court will prefer the construction which makes it an executory contract, since by such construction mutual rights are conferred upon both parties thereto" (*Page on Contracts,* 2nd Ed. Vol. 4, p. 3547, and cases there cited).

This rule of construction would further militate against that phase of appellant's present argument to the effect that the Pineapple Company would have the valuable right to purchase pineapples which might be grown upon lands distant from Leilehua, whereas there would be no mutually valuable right to Saito to sell those pineapples.

IV.

THE INJUNCTION IN THIS CASE WAS IMPROPERLY ISSUED BY THE TRIAL COURT, BECAUSE IT COMPELLED THE PERFORMANCE OF A CONTRACT FOR THE SALE OF CHATTELS, FOR THE BREACH OF WHICH THE LEGAL REMEDY WAS ADEQUATE.

It is a well recognized rule of law that a court of equity will not by injunction or decree specifically enforce a contract for the sale and delivery of chattels, because the damage which is suffered by reason of the failure to deliver chattels is a damage which may be easily ascertained and which therefore gives the basis for full and adequate compensation at law.

The injunction issued by the trial court in this case contained the following provision:

> "Now therefore, you, the said Masamari Saito, respondent herein, your agents, servants and attorneys, are and each of you are hereby enjoined from delivering to the said respondent, Libby, McNeill & Libby of Honolulu, Limited, *or to anyone other than the Hawaiian Pineapple Company, Limited.* * * *" (Trans. p. 170.)

It will be seen that the injunction was in substance a specific enforcement of the alleged contract to sell and deliver to the Hawaiian Pineapple Company.

> "As a general rule specific performance is not decreed where the subject matter of a contract is personal property; since the compensation which would be recovered in an action at law is deemed to be an adequate remedy for the breach of the contract. *36 Cyc.,* 554, 555."

Appellant has attempted to bring this case within an exception to the general rule above stated, which exists in the case of chattels having a "pretium affectionis"

or peculiar value, which they contend was the case here, because other pineapples could not be purchased, to replace those lost under the alleged contract. Counsel have dwelt at considerable length upon this exception to the rule, entirely losing sight of the fact that the facts of the present case fail to show the existence of the reason for the exception, namely that the case is one in which it is not possible to accurately ascertain the extent of the damage threatened. Their argument is that, because other pineapples cannot be purchased elsewhere, the court should by its injunction specifically enforce this contract, although it is a fact that these pineapples were of no peculiar value to the Hawaiian Pineapple Company, and had indeed already been resold at a definite price, so that the computation of the damage suffered was a mere matter of arithmetic.

By having already resold the pineapples, to compel delivery of which the injunction was asked (Trans. p. 227), the Hawaiian Pineapple Company had definitely placed a price and valuation upon the chattels in question. The following rule of law therefore applies:

> "Where the party who seeks to recover a chattel of such a character that a Court of Equity would ordinarily decree its delivery to him has set a price upon it in dealings with another, the ground of equity jurisdiction fails" *(36 Cyc.,* 556, and cases there cited).

The evidence further shows that the overhead and running expenses of the cannery would be practically the same whether the pineapples, the delivery of which the court of equity was asked to compel, were or were not in-

cluded within the pack. The measure of damages in an action at law could readily have been ascertained. The extent of those damages would have been the profit which would have been made by delivering those pineapples to purchasers who had already contracted to buy them at a definite price, with no additional overhead or running expenses to consider.

The case of *Marthinson v. King,* 150 Fed. 48, is an interesting case in this connection. At first glance it would appear that the facts of the case show a perfect right in the complainant for specific performance of the contract in question, either by decree or injunction. The contract was for the purchase of growing timber situate on certain lands and of a camp outfit and other equipment for placing the timber upon the market. The profits which might be realized from the outfit purchased dependent upon a fluctuating timber market, would be and were to the highest degree speculative and not capable of ascertainment, but, it came to the attention of the court, that as a matter of fact, the purchaser who was before the court seeking specific performance of the contract had already contracted to sell the entire outfit to another person at a definite sum, just as the complainant in the present case had done, with respect to the pineapples in question. It would probably not have been possible for the complainant in that case to have secured just such a lumber outfit anywhere in the world, but that fact did not give the court any particular concern. As soon as it became apparent to the court that the damage had been substantially fixed by the resale at a definite figure, the court held

that it was beyond the jurisdiction of the court as a court of equity to compel the performance of the contract, inasmuch as the remedy at law was ample and adequate.

The court in that case says in part:

> "King, who had the title to the property, sold or agreed to sell it to Marthinson, the plaintiff, for $1000 cash, the remainder of the price to be paid later. * * * Marthinson at the same time extended the Company's option, and sold, or agreed to sell the property at a larger price to the Company. * * * The result of the performance of both agreements would have been that the Company would have had the title to the property and Marthinson would have made the difference between what he paid King and the larger price which he received from the Company.
>
> * * * * * * *
>
> What he really was entitled to was the amount of his damages—his lost profits—taking the averments of the bill as true. Both defendants being solvent, his remedy at law was ample and adequate when the bill was filed." *(Marthinson v. King,* 150 Fed. 53, 54.)

The following quotation from *Equitable Gas Co. v. Baltimore Coal Tar etc. Co.,* 63 Md. 285, is particularly applicable here:

> "The question then arises whether the contract is of such a nature that a Court of Equity will specifically enforce it; for it seems to be a well settled general rule that *the Court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform.* In such a case the party injured by the breach of a contract is left to his remedy at law" *(Equitable Gas Light Co. v. Baltimore Coal Tar and Mfg. Co.,* 63 Md. 285).

Appellant lays particular stress upon the holding of the court in the case of *Curtice Bros. Co. v. Catts,* 66 Atl. 935; 72 N. J. Equity 831. The facts of that case, so far as the questions under consideration are concerned, are entirely different from the facts in the present case. In that case there was nothing to show that any valuation had been placed upon the chattels to compel the delivery of which the action was brought. There was no evidence showing or from which a court could possibly have determined what profits would be lost if the purchaser did not get the chattels alleged to have been contracted for. The whole reason which makes the case at bar one in which the damage suffered could have been easily ascertained, was entirely lacking in that case, which was simply the case of an alleged contract for the purchase of chattels of a peculiar value because they could not be purchased elsewhere.

We have examined the other four cases cited by appellant in this connection namely, *Gloucester Isinglass & Glue Co. v. Russian Cement Co.,* 154 Mass. 92; *Vail v. Osborne,* 174 Pa. St. 580; *Mutual Oil Co. v. Hills,* 248 Fed. 257; and *Maloney v. Cressler,* 236 Fed. 636. No one of them has facts similar to the facts in the present case. In no one of them had the damage which would be suffered by failure to get the commodities alleged to have been contracted for, been definitely ascertained by a resale of the commodities at a definite price.

The only other item of so-called speculative damage not capable of definite ascertainment at law, to which appellant points, is the damage which it claims the Pineapple Company would suffer from failure to make

full delivery to its customers. We have no quarrel with the law laid down by the cases cited by counsel in this connection, but the facts of the present case wholly fail to bring it within the operation of the rule referred to. The evidence shows that in the year in which appellant's bill of complaint was filed, the Hawaiian Pineapple Company had contracted to sell 251,301 cases of pineapples more than it had estimated that it would have available for sale (Trans. p. 227). It is, therefore, evident that the Hawaiian Pineapple Company was not going to be able to fully fill its orders, wholly irrespective of whether or not it got the pineapples from Saito's after-acquired lands. It further definitely appears from the evidence that the customers of the Hawaiian Pineapple Company were fully advised of the fact that they probably would not get all of the pineapples that they had contracted for and indeed that a provision had been inserted in all of the contracts with these purchasers, definitely providing for that contingency by a prorating of the fruit among the various customers (Trans. p. 242).

There is nothing, we submit, to show that the appellant could not have been fully compensated in an action at law for the alleged breach of the contract. There was, therefore, an entire lack of facts necessary to give a court of equity jurisdiction.

V.

THIS COURT IS WITHOUT JURISDICTION TO HEAR AND DETERMINE THIS APPEAL, BECAUSE THE JUDGMENT AND DECREE OF THE SUPREME COURT OF HAWAII APPEALED FROM WAS NOT FINAL.

The point here raised was heretofore considered by this court on the hearing of appellant's petition for an injunction pending the appeal (260 Fed. 153). We are asking the court to reconsider this question, because, on September 7, 1920, this court decided the case of *Rumsey v. N. Y. Life Ins. Co. et al.,* No. 3444, holding that no appeal would lie from the decree in that case, because it was not final, and the decree in the case at bar is practically the same, in this particular, as the decree in the *Rumsey* case. The two decrees, in this connection, are as follows:

Decree In Rumsey Case Held Not Final.	Decree Appealed From In Present Case.
Cause remanded to the Circuit Judge "for such further action compatible to the decision as may be necessary".	Lower Court instructed "to dismiss the complainant's bill of complaint filed therein, and to take such further or other proceedings prior or subsequent to the dismissal of the bill as may be consistent with the opinion of this court in said cause" (Tr. p. 191).

In the *Rumsey* case this court held that the form of the decree was conclusive as to its finality, and that the decree of the Supreme Court of Hawaii was not a final decree, within the meaning of the statute conferring appellate jurisdiction. After carefully considering the cases, to the effect that the form of the decree must be

looked to in determining the question of its finality, this court said:

> "Compelled, as we are, by the force of these decisions to look at the form of the decree herein for the purpose of determining the question of its finality, we find that it is a decree which reverses the judgment of the Circuit Court and remands the cause for further proceedings in harmony with the Supreme Court's opinion. It follows that it was not final. Haseltine v. Ct. Bk. of Springfield, 183 U. S. 130; Schlosser v. Hemphill, 198 U. S. 173. * * * The appeal is dismissed."

It may, furthermore, well be suggested that, even if this court were not to apply the rule laid down by it in the *Rumsey* case, but were to hold that something further than the form of the decree should be looked to in determining its finality, it would, nevertheless, now definitely appear from the record before the court that *further proceedings* were contemplated in this case in the trial court, other than the mere entry of a decree dismissing the bill. It is apparent from the record that proceedings will, if the judgment is affirmed, have to be had in the lower court for the assessment of damages under the bond filed upon the issuance of the temporary injunction. In those proceedings various questions may well arise which would have to be made the subject of a second appeal, before the rights of the parties could be finally adjudicated. We, therefore, submit that the decree appealed from clearly is not final.

CONCLUSION.

It is respectfully submitted that, independently of the question of the jurisdiction of this court to entertain this appeal, the decree of the Supreme Court of Hawaii should be affirmed for the following reasons: *First,* because, as heretofore concluded by this court, the contract in question, by its unambiguous language, clearly had no application to pineapples or pineapple lands which might be acquired by the planter after the execution of the contract, and not within the contemplation of the parties at the time that the contract was made; *second,* because, even if there were any ambiguity in the language of the contract itself, the circumstances surrounding its execution, and the acts of the parties placing construction upon it, indicate an intent to contract with respect to crops of pineapples then definitely ascertained; *third,* because every rule of law governing the construction of contracts favors the construction contended for by the appellees; and *finally,* because, there having been an adequate remedy at law, the trial court was without jurisdiction to grant injunctive relief.

Dated, San Francisco,
October 14, 1920.

Respectfully submitted,

THOMPSON, CATHCART & LEWIS,
BARRY S. ULRICH,
Solicitors for Appellees.

PILLSBURY, MADISON & SUTRO,
L. G. MCARTHUR,
Of Counsel.